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In the Supreme Court of the United States

OCTOBER TERM, 1995

PLAINVILLE READY MIX CONCRETE COMPANY,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether substantial evidence supports the National Labor Relations Board's finding that the wage and health plans that petitioner implemented after a bargaining impasse were not reasonably comprehended within its pre-impasse proposals.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A2-A51) is reported at 44 F.3d 1320. The decision and order of the National Labor Relations Board (Pet. App. A52-A53), and the decision of the administrative law judge (Pet. App. A53-A90), are reported at 309 N.L.R.B. 581.

JURISDICTION

The judgment of the court of appeals was entered on January 26, 1995. A petition for rehearing was denied on April 27, 1995. Pet. App. A91. The petition for a writ of certiorari was filed on July 26, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner manufactures, distributes, and sells ready mix concrete. Pet. App. A4. Since the 1960s, petitioner has had a collective-bargaining relationship with a Union (the Truckdrivers, Chauffeurs and Helpers Local Union No. 100, a/w International Brotherhood of Teamsters, AFL-CIO). *Id.* at A3-A4. The Union represents approximately forty employees in a unit consisting of ready mix drivers, yard employees, and mechanics. *Ibid.* The parties' most recent labor agreement was effective through January 31, 1988. *Ibid.*

At the outset of negotiations for a new contract, petitioner informed the Union that it wanted to reduce the drivers' wage rate from $10.27 per hour to $9.00 in order to compete more effectively. Pet. App. A4. In conjunction with the reduced wage rate, petitioner proposed to establish gain sharing and incentive pay plans to offset the loss in wages. *Id.* at A4-A5. The Union objected to petitioner's wage proposal; it preferred a fixed hourly wage at a rate higher than $9.00 per hour. *Id.* at A6. The Union was concerned that, in the event of a recession, construction work would slacken, resulting in the employees' effectively earning no more than $9.00 per hour. *Ibid.* Petitioner responded with a final offer in which it proposed to reduce the hourly rate to $9.50 in conjunction with establishing gain sharing and incentive pay. *Ibid.* Petitioner also proposed to replace the employees' Teamsters-sponsored health-insurance plan with a company-sponsored plan. *Ibid.* The Union rejected petitioner's final offer, the parties reached a bargaining impasse, and petitioner implemented its final

offer. *Ibid.* The validity of petitioner's action in implementing that final offer is not at issue here.

Approximately one year later, the parties resumed negotiations. Pet. App. A7. The Union proposed that employees be paid a higher fixed hourly wage, without gain sharing and incentive pay. *Ibid.* The Union also proposed that petitioner return to a Teamster health plan. *Id.* at A28. Petitioner responded with a final offer: In lieu of the gain sharing and incentive pay, petitioner offered to increase the $9.50 hourly base pay rate incrementally over an eight-month period, first to $9.75, then to $10.00, and finally to $10.25. *Id.* at A7. Petitioner also proposed a list of ten changes to the company-sponsored health plan (*id.* at A79): some of the changes represented additional benefits for employees (*e.g.*, a voluntary vision-care program, a prescription drug card, and coverage for emergency care), while other changes represented additional costs to employees and limitations on benefits (*e.g.*, a 200% increase in the deductible for family coverage, an increase in the employees' share of the monthly premium, and a lifetime cap of $10,000 for alcohol and drug treatment programs). *Id.* at A28, A79-A80. The Union rejected petitioner's final offer, and the parties again reached a bargaining impasse. *Id.* at A8.

Thereafter, petitioner implemented parts of its final offer. Pet. App. A8. Petitioner eliminated gain sharing and incentive pay, but did not implement the three $.25 per hour wage increases. *Ibid.* Petitioner also implemented those changes to the health plan that increased the employees' costs and limited their benefits, but it did not implement any of the changes that would have been beneficial to the employees. *Id.* at A8-A9.

2. The General Counsel of the National Labor Relations Board (Board) issued a complaint, alleging that petitioner had violated Section 8(a)(5) and (1) of the National Labor Relations Act (NLRA), 29 U.S.C. 158(a)(5) and (1), by implementing changes in its employees' terms and conditions of employment after a bargaining impasse that had not been encompassed within its pre-impasse proposals. Pet. App. A53. After a hearing, the administrative law judge (ALJ) ruled in the Board's favor. *Id.* at A52-A90.

The ALJ found that petitioner's pre-impasse wage proposal was to provide "fixed wage increase[s] in lieu of gain sharing and incentive pay." Pet. App. A72. The ALJ further found that petitioner had never proposed eliminating gain sharing without also increasing fixed wages (*id.* at A66); the elimination of the gain sharing and incentive pay "was entirely conditional upon [petitioner's] proposed increase in the fixed wages" (*id.* at A77). Because petitioner eliminated gain sharing and incentive pay, without increasing fixed wages, the ALJ concluded that petitioner had implemented a change in wages that was not "reasonably comprehended" within its pre-impasse proposals, and had thereby violated Sections 8(a)(5) and (1) of the NLRA. *Id.* at A75.

Turning to the issue of health insurance, the ALJ noted petitioner's concession "that it implemented only those parts of its final health plan offer which were disadvantageous changes and did not implement the improvements that it had proposed." Pet. App. A81. The ALJ found that the elements of petitioner's health plan were "individually identifiable in the pre-impasse offer" (*id.* at A82). The ALJ also found, however, that "the plan was presented as a health

insurance plan," and that "the elements of the plan do bear an economic and functional relationship to each other." *Id.* at A83. The ALJ therefore concluded that "to implement only parts of the plan, a fortiori those parts of the plan principally detrimental to the employees, is an unlawful implementation." *Ibid.* (footnote omitted).

The ALJ issued a remedial order requiring petitioner to reinstate the wage and health plans as they existed prior to petitioner's unlawful changes. Pet. App. A87. It also required petitioner to make employees whole for the losses they had suffered as a result of those changes. *Ibid.*

The Board affirmed the ALJ's findings and conclusions and adopted his remedial order. Pet. App. A52-A53.

3. The court of appeals enforced the Board's order. Pet. App. A2-A41. The court explained that "this is a very fact-specific case and based on the facts, the implementations made were not 'reasonably comprehended' within [petitioner's] pre-impasse proposals." *Id.* at A39.

The court specifically found substantial evidence to support the Board's conclusion that petitioner had "treated the proposed fixed hourly wage rate increase and elimination of the gain sharing and incentive pay plans as a 'total package deal' in regard to the amount of wages the employees would receive, and that the elimination of the incentive pay and gain sharing plans without a concomitant increase in the fixed hourly wage rate was inconsistent with its final pre-impasse offer." Pet. App. A14. "Since a fixed rate of $9.50 per hour was never offered in conjunction with the elimination of gain sharing and incentive pay by

[petitioner]," the court found that "it was not reasonably considered by Union members, who 'reasonably comprehended' that they would receive three $.25 per hour rate increases 'in lieu of gain sharing and incentive pay.'" *Id.* at A26.

The court also found that substantial evidence supported the Board's finding that petitioner's unilateral changes in its health plan were unlawful. Pet. App. A27. In particular, the court found that "it was 'reasonably comprehended' by the Union that if costs and limitations were to be increased over the existing plan, the Union would also receive the additional benefits proposed"; that "the [c]ompany health plan was presented as a comprehensive, integrated alternative to the Teamster plans"; and that "there is no evidence that [petitioner] indicated that it planned to implement only th[e] [disadvantageous] items without also implementing the additional benefits." *Id.* at A36.

Judge Batchelder dissented. Pet. App. A42-A51. In her view, the majority had effectively "mandate[d] that an employer unilaterally implement no fewer than all final proposals pertaining to a single, general mandatory subject of bargaining, such as wages or medical insurance." *Id.* at A46.

ARGUMENT

The court of appeals correctly upheld the Board's finding that petitioner violated the NLRA by implementing changes in its employees' wages and health insurance that were not reasonably comprehended within its bargaining proposals. The court's decision does not conflict with that of any other circuit. Review by this Court is therefore not warranted.

1. Under the NLRA, an employer's unilateral change in conditions of employment under negotiation

is a violation of Section 8(a)(5). *NLRB* v. *Katz*, 369 U.S. 736, 743 (1962). Once an impasse is reached, however, an employer is not absolutely precluded from making all unilateral changes. At that point, "an employer does not violate the Act by making unilateral changes that are reasonably comprehended within his pre-impasse proposals." *Taft Broadcasting Co.*, 163 N.L.R.B. 475, 478 (1967), enforced *sub nom. American Federation of Television & Radio Artists* v. *NLRB*, 395 F.2d 622 (D.C. Cir. 1968). Unilateral changes that are not reasonably comprehended within an employer's pre-impasse proposals, however, violate the NLRA. *Ibid.* The requirement that post-impasse unilateral changes must be "reasonably comprehended" within prior proposals ensures that the union has had notice and an opportunity to bargain about those changes. *A.H. Belo Corp. (WFAA-TV)* v. *NLRB*, 411 F.2d 959, 971 (5th Cir. 1969), cert. denied, 396 U.S. 1007 (1970). Implementing changes without affording the union such an opportunity is inimical to the collective bargaining process. See *May Dep't Stores Co.* v. *NLRB*, 326 U.S. 376, 385 (1945).

Applying those well-established principles, the Board determined that petitioner violated the NLRA because the changes that petitioner implemented in its employees' wages and health insurance were not "reasonably comprehended" within its final offer to the Union. Pet. App. A14. That determination is supported by substantial evidence. As the court of appeals noted, petitioner's final wage offer was presented as one inseparable package consisting of a base rate of $9.50 per hour, three $0.25 per hour increases effective on specified future dates, and the elimination of gain sharing and incentive pay. *Id.* at

A17. Petitioner never presented an offer that would have put the Union on notice that elimination of gain sharing and incentive pay might be implemented without the increases in base pay. *Id.* at A66, A77. Accordingly, petitioner's elimination of gain sharing and incentive pay, without the accompanying increases in base pay, was not reasonably comprehended within petitioner's pre-impasse proposals.

Substantial evidence also supports the Board's finding that petitioner's unilateral changes in its health plan were not reasonably comprehended within its pre-impasse offers. As the court of appeals explained, "[n]owhere in the record is there any indication that [petitioner] manifested its intent to the Union to implement only the disadvantageous elements of the health plan." Pet. App. A37. Instead, "it was 'reasonably comprehended' by the Union that if costs and limitations were to be increased over the existing plan, the Union would also receive the additional benefits proposed." *Id.* at A36.

2. a. Petitioner contends (Pet. 12-13) that the Board's decision in this case is inconsistent with its recognition in *Presto Casting Co.*, 262 N.L.R.B. 346 (1982), enforced in relevant part, 708 F.2d 495 (9th Cir.), cert. denied, 464 U.S. 994 (1983), that, after a lawful impasse, an employer is free to implement some of its final proposals without implementing all of them. That contention is without merit. *Presto* made clear that an employer may make unilateral changes in working conditions only if they are "consistent with the offers the union has rejected." 262 N.L.R.B. at 354. Because the changes in wages and health benefits implemented by petitioner were not consis-

tent with the offers on those subjects that the Union rejected, petitioner's reliance on *Presto* is misplaced.

b. Petitioner next contends (Pet. 13) that the court of appeals mistakenly applied a subjective rather than an objective test in deciding that petitioner's unilateral changes were not reasonably comprehended in its pre-impasse proposals. That contention is also without merit. The court expressly stated that "after carefully reviewing the record, [we] have concluded that there is substantial evidence to support the ALJ's determination that by an *objective* standard, the Union reasonably comprehended that [petitioner] was not proposing the overall reduction in wages and changes in health benefits that occurred." Pet. App. A40.

c. Petitioner argues (Pet. 15) that the court of appeals' decision effectively requires an employer to implement no less than all final proposals pertaining to a mandatory subject of bargaining, such as wages or medical insurance. The court of appeals, however, expressly disavowed any such holding. Pet. App. A40-A41. Instead, the court explained that "[b]ased on the facts of this particular case, we have found that an employer, who consistently presents a portion of a single, general mandatory subject of bargaining as interrelated, in the sense that the inclusion of one item is presented as *quid pro quo* for the elimination of another item, may not fragment the *quid pro quo* during implementation." *Id.* at A40. Thus, under the court of appeals' decision, had petitioner presented the elimination of gain sharing and incentive pay to the Union as a discrete component of its wage proposal that might be implemented separately, it would have been free to implement that part of its proposal

after impasse. It is only because petitioner itself consistently tied the elimination of gain sharing and incentive pay to an increase in base pay that it could not implement one without the other after impasse.

d. Petitioner contends (Pet. 15-17) that the court of appeals' decision conflicts with this Court's decision in *NLRB* v. *Crompton-Highland Mills, Inc.*, 337 U.S. 217 (1949), and the Second Circuit's decision in *Emhart Industries* v. *NLRB*, 907 F.2d 372 (1990). There is, however, no such conflict.

In *Crompton-Highland*, the Court stated that an employer may not implement changes in terms and conditions of employment "which are substantially different from, or greater than, any which the employer has proposed during its negotiations." 337 U.S. at 225. Here, as the court of appeals expressly found, petitioner's changes were "significantly different than what [petitioner] presented to the Union in its pre-impasse offers." Pet. App. A41. The court of appeals' decision is therefore consistent with *Crompton-Highland*.

In *Emhart*, the Second Circuit held that, "[o]nce an employer bargains in good faith to impasse, its duty to bargain further is suspended, and it is free to impose all—or part—of its pre-impasse proposals, provided its actions were 'reasonably comprehended' within its earlier offers to the union." 907 F.2d at 377. That is the same standard applied by the court of appeals in this case. Pet. App. A10-A11, A40-A41. As petitioner notes, *Emhart* upheld an employer's implementation of its proposal to reinstate strikers by plant-wide seniority, even though the employer did not implement its entire pre-impasse proposal. But the employer in that case presented reinstatement by

plant-wide seniority as a discrete element of its proposal that could be implemented separately, and there was no evidence that the unimplemented part of the employer's proposal was significant. 907 F.2d at 377-378. On those facts, the Second Circuit concluded that reinstatement by plant-wide seniority "was surely 'reasonably comprehended' within Emhart's [final] proposal, even if other aspects of that proposal were not also implemented." *Ibid.* Nothing in *Emhart* remotely suggests that the Second Circuit would approve petitioner's approach of presenting components of a proposal as an interrelated package during bargaining and then implementing only the disadvantageous components after impasse.

3. Finally, there is no merit to petitioner's contention (Pet. 18-22) that the decision below violates the principle that the Board may not deny economic weapons to one party or the other because of its assessment of that party's bargaining power. The Board did not make any assessment of the relative bargaining strength of petitioner vis-a-vis the Union in finding that petitioner violated the NLRA. Rather, the Board applied the settled legal principles concerning post-impasse unilateral changes to the largely undisputed facts of this case. After a lawful impasse, an employer may bring economic pressure to bear on a union by implementing unilateral changes in terms and conditions of employment, provided that the changes are reasonably comprehended within the employer's pre-impasse offers. The Board, sustained by the court of appeals, found that petitioner's post-impasse changes in its employees' wages and health benefits failed that test. That fact-specific determination raises no issue warranting further review. See

Universal Camera Corp. v. *NLRB*, 340 U.S. 474, 490-491 (1951).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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